No. 83-1919

Office - Supreme Court, U.S.
FILED
DEC 15 1984
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE CITY OF OKLAHOMA CITY,

Petitioner,

—v.—

ROSE MARIE TUTTLE,

Respondent.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

DON ED PAYNE
American Civil Liberties
Union of Oklahoma Foundation
P. O. Box 785
Hugo, Oklahoma 74743
(405) 326-6453

December 15, 1984

TABLE OF CONTENTS

Pages

INTEREST OF AMICI CURIAE.....1

INTRODUCTION AND SUMMARY OF ARGUMENT.....2

ARGUMENT.....4

I. A Municipality May Be Found Liable Under 42 U.S.C. § 1983 For Constitutional Violations Caused By The Municipality's Custom of Providing Inadequate Training And Supervision of' Its Police Force.....4

A. A Plaintiff Need Not Prove a Pattern of Prior Similar Violations.....5

B. Municipal Liability in This Case Will Not Lead to Strict Liability Against Municipalities.....27

II. A Rule Barring Municipal Liability For Inadequate Training and Supervision Resulting in a Single Incident of Official Misconduct Would Eviscerate The Compensatory and Deterrent Goals of 42 U.S.C. § 1983.....31

A. The Legislative History of § 1983 Evinces Congressional Intent to Impose Liability on Municipalities Not Only for Affirmative Harms, But Also for Failure to Act to Protect the Constitutional Rights of Citizens.....31

B. The Compensatory and Deterrent Functions of § 1983 Require Municipal Liability Under the Circumstances of this Case.....35

C. A Municipality Is In The Best Position To Evaluate The Costs and Benefits of Additional Police Training and Supervision.....45

CONCLUSION.....49

TABLE OF AUTHORITIES

Cases

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970).....3, 6, 13, 14

Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355 (1962).....22

Avery v. County of Burke, 660 F.2d 111 (4th Cir. 1981).....29

Baker v. McCollan, 443 U.S. 137 (1979).....28

Batista v. Rodriguez, 702 F.2d 393 (2d Cir. 1983).....8

Bennett v. City of Slidell, 728 F.2d 762 (5th Cir.) (en banc), petition for reh'g denied per curiam, 735 F.2d 863 (5th Cir. 1984) (en banc), petition for cert. filed, 53 U.S.L.W. 3419 (U.S. Sept. 14, 1984).....9, 12

Berry v. McLemore, 670 F.2d 30 (5th Cir. 1982).....10

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).....38

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982).....23

Bose Corp. v. Consumers Union,
80 L.Ed.2d 502 (1984).....23

Butz v. Economou,
438 U.S. 478 (1978).....38

Carey v. Piphus,
435 U.S. 247 (1978).....36, 38, 40

Carlson v. Green,
446 U.S. 14 (1980).....40

Continental Oil Co. v. Union
Carbide & Carbon Corp.,
370 U.S. 690 (1962).....22

Doe v. New York City Department
of Social Services,
709 F.2d 782 (2d Cir.),
cert. denied,
104 S. Ct. 195 (1983).....20

Estelle v. Gamble,
429 U.S. 97 (1976).....29

Gilmere v. City of Atlanta,
737 F.2d 894 (11th Cir. 1984).....29

Hahn v. Atlantic Richfield Co.,
625 F.2d 1095 (3d Cir. 1980),
cert. denied,
450 U.S. 981 (1981).....22

Hardeman v. Clark,
593 F. Supp. 1285 (D.D.C. 1984).....8

Harlow v. Fitzgerald,
457 U.S. 800 (1982).....26, 44

Hays v. Jefferson County,
668 F.2d 869 (6th Cir.),
cert. denied,
459 U.S. 833 (1982).....8, 29

Herrera v. Valentine,
653 F.2d 1220 (8th Cir. 1981).....8, 20

Hill v. Marinelli,
555 F. Supp. 413 (N.D. Ill. 1982).....8

Imbler v. Pachtman,
424 U.S. 409 (1976).....40, 44

Independence Tube Corp. v.
Copperweld Corp.,
691 F.2d 310 (7th Cir. 1982),
rev'd, 81 L.Ed.2d 628 (1984).....22, 24

Iskander v. Village of
Forest Park,
690 F.2d 126 (7th Cir. 1982).....20

Languirand v. Hayden,
717 F.2d 220 (5th Cir. 1983),
cert. denied,
104 S. Ct. 2656 (1984).....11

Lavender v. Kurn,
327 U.S. 645 (1946).....22

Leite v. City of Providence,
463 F. Supp. 585 (D.R.I. 1978).....9, 29

Lenard v. Argento,
699 F.2d 874 (7th Cir.),
cert. denied,
104 S. Ct. 69 (1983).....11

Littlefield v. Deland,
641 F.2d 729 (10th Cir. 1981).....8

Loehr v. Offshore Logistics, Inc.,
691 F.2d 758 (5th Cir. 1982).....24

Lombard v. Louisiana,
373 U.S. 267 (1963).....13

Los Angeles v. Lyons,
75 L.Ed.2d 675 (1983).....43

Marbury v. Madison,
1 Cranch 137 (1803).....44

Monell v. Department of
Social Services,
436 U.S. 658 (1978).....passim

Monell v. Department of
Social Services,
532 F.2d 259 (2d Cir. 1976),
rev'd, 436 U.S. 658 (1978).....5

Monroe v. Pape,
365 U.S. 167 (1961).....4, 32, 33

Nashville, Chattanooga & St. Louis
Railway Co. v. Browning,
310 U.S. 362 (1940).....13

New York Central & Hudson
River Railroad Co. v. Fraloff,
100 U.S. 24, 25 L.Ed. 531 (1879).....24

Newport v. Fact Concerts, Inc.,
453 U.S. 247 (1981).....5, 17, 40, 43

Nunez v. Superior Oil Co.,
572 F.2d 1119 (5th Cir. 1978),
aff'd following remand,
644 F.2d 534 (5th Cir. 1981).....24

Owen v. City of Independence,
445 U.S. 622 (1980).....passim

Owens v. Haas,
601 F.2d 1242 (2d Cir.),
cert. denied,
444 U.S. 980 (1979).....8, 9, 29

Parratt v. Taylor,
451 U.S. 527 (1981).....28

Peterman v. Chicago, Rhode Island
& Pacific Railroad Co.,
516 F.2d 328 (8th Cir.),
cert. denied,
423 U.S. 869 (1975).....23

Pierson v. Ray,
386 U.S. 547 (1967).....44

Polk County v. Dodson,
454 U.S. 312 (1981).....5

Popow v. City of Margate,
476 F. Supp. 1237 (D.N.J. 1979).....9

Powe v. City of Chicago,
664 F.2d 639 (7th Cir. 1981).....8

Pullman-Standard v. Swint,
456 U.S. 273 (1982).....23

Rizzo v. Goode,
423 U.S. 362 (1976).....15, 16, 48

Robertson v. Wegmann,
436 U.S. 584 (1978).....36, 37, 40

Rogers v. Lodge,
458 U.S. 613 (1982).....7

Samuels v. Health & Hospitals Corp., 591 F.2d 195 (2d Cir. 1979).....23

Smith v. Wade, 75 L.Ed.2d 632 (1983).....31

Thurman v. City of Torrington, 53 U.S.L.W. 2246 (D. Conn. Oct. 23, 1984).....8

Turpin v. Mailet, 619 F.2d 196 (2d Cir.), cert. denied, 449 U.S. 1016 (1980).....9, 20, 29

Tuttle v. City of Oklahoma City, 728 F.2d 456 (10th Cir. 1984), cert. granted, 53 U.S.L.W. 3235 (U.S. Oct. 1, 1984).....9

United States v. Johnson, 457 U.S. 537 (1982).....41

United States v. United States Gypsum Co., 333 U.S. 364 (1948).....23

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).....7

Washington v. Davis, 426 U.S. 229 (1976).....7

Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), petition for reh'g en banc granted, 711 F.2d 35 (5th Cir. 1983), vacated and remanded per curiam, 735 F.2d 838 (5th Cir.) (en banc), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc rehearing).....6, 10, 12, 42

Wellington v. Daniels, 717 F.2d 932 (4th Cir. 1983).....11, 29

Statutes

Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1871) (now codified as 42 U.S.C. § 1983).....32

18 U.S.C. § 241.....43

18 U.S.C. § 242.....43

18 U.S.C. § 245.....43

Federal Rules of Civil Procedure Rule 52(a).....23

42 U.S.C. § 1983.....passim

Legislative Material

Congressional Globe,
42d Cong., 1st Sess. (1871).....33, 34, 35

Congressional Globe Appendix,
42d Cong., 1st Sess. (1871).....34, 35

Other Authorities

G. Calabresi, The Costs of Accidents (1970).....45

Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055 (1972).....45

Developments, Section 1983 and Federalism, 90 Harv. L. Rev. 1133 (1977).....35

5A Moore's Federal Practice
¶ 50.07[2] (1984).....22

J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct,
87 Yale L.J. 447 (1978).....37, 46

Note, Municipal Liability Under Section 1983: The Meaning of "Policy or Custom,"
79 Colum. L. Rev. 304 (1979).....35

Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases,
57 Wash. L. Rev. 635 (1982).....47

Posner, Rethinking the Fourth Amendment,
1981 S. Ct. Rev. 49.....47

Schnapper, Civil Rights Litigation After Monell,
79 Colum. L. Rev. 213 (1979).....40

P. Schuck, Suing Government (1983).....46, 48

9 Wright & Miller, Federal Practice & Procedure § 2558 (1971 & Supp. 1984).....20

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The American Civil Liberties Union of Oklahoma Foundation is one of its state affiliates.

The American Civil Liberties Union has long worked to defend basic constitutional rights, and in so doing, has in recent years filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of the statute, 42 U.S.C. § 1983, at issue in this case. With the consent of the parties, indicated by letters we have lodged with the Clerk of this Court, we file this brief amici curiae to bring our experience to bear on the important questions presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

It is well-settled that a municipality may be liable under 42 U.S.C. § 1983 for federal constitutional violations caused by a formal, written municipal policy or by decisions of policymaking officials. It is equally well-settled that a municipality may not be liable under § 1983 on a respondeat superior theory. This case presents the intermediate issue of whether a municipality may be liable under § 1983 when a properly charged jury finds, upon reviewing extensive evidence, that a municipal custom of patently inadequate training and supervision of the police force caused the death of plaintiff's husband. Oklahoma City's custom consisted of police training and supervision so grossly negligent or reckless as to amount to deliberate indifference to the likely consequences: constitutional violations and fatal injuries.

In its simplest form, this case concerns whether the shooting of Mr. Tuttle may be fairly traceable to the city rather than to a street-level police officer. Amici curiae maintain that the presence of a city custom of grossly negligent training and supervision provides the necessary causal link between the city and the constitutional violation.

A plaintiff alleging a constitutional violation caused by a municipal policy or custom need not prove a pattern of similar prior incidents. This Court has already directly held that a § 1983 plaintiff may prove a custom absent evidence of a pattern of similar prior incidents. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 173 (1970). A § 1983 plaintiff can prove that a "policy or custom" caused an injury without having simultaneously to try a handful of police brutality cases concerning similar incidents. Nor need many citizens of a city

be shot to death by rookie police officers who had received grossly negligent training and supervision before the survivors of one victim may hold the city liable for damages.

ARGUMENT

I. A Municipality May Be Found Liable Under 42 U.S.C. § 1983 For Constitutional Violations Caused By The Municipality's Custom of Providing Inadequate Training And Supervision of Its Police Force.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court reversed its earlier holding in Monroe v. Pape, 365 U.S. 167 (1961), and held that municipalities could be liable under 42 U.S.C. § 1983. While Monell clearly required a § 1983 plaintiff alleging municipal liability to prove that a municipal policy or custom violated plaintiff's federal rights and caused an injury, 436 U.S. at 691, Monell did not trace the "full contours of municipal liability under § 1983." Id. at 695. Monell and subsequent decisions of this Court have

not defined the quantum and nature of proof necessary to prove a policy or custom based on a failure to act; nor has the Court defined the requisite causal nexus between a municipality's "policy or custom" and plaintiff's injury, beyond holding that a policy or custom must be "the moving force" behind the constitutional violation. Polk County v. Dodson, 454 U.S. 312, 326 (1981).

A. A Plaintiff Need Not Prove a Pattern of Prior Similar Violations.

A municipal policy or custom may take many forms and therefore can be established by different types of proof. A policy may be formal and written.[1] It may be a decision adopted and promulgated by the municipality's policymakers.[2] A custom may be found even

---

[1] E.g., Monell, 436 U.S. at 694-95; Monell v. Department of Social Services, 532 F.2d 259, 260 (2d Cir. 1976) (challenge to "rules and regulations" of city agencies).

[2] E.g., Newport v. Fact Concerts, Inc., 453 U.S. 247, 251-52 (1981); Owen v. City of Independence, 445 U.S. [cont'd. on next pg]

though the custom had not received formal approval through the municipality's official decisionmaking channels.[3] A custom is formed by the well-established, routine behavior of municipal employees or officials who act with the tacit approval of municipal policymakers.[4]

No municipality today would openly adopt a policy authorizing its police officers to use unconstitutionally excessive force against persons. Even those police departments and officials that might still condone or encourage violent police misconduct have become sufficiently sensitive to the operation of our judicial system that

---

622, 625-30 (1980).

[3] Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970); see Monell, 436 U.S. at 690-91.

[4] Webster v. City of Houston, 735 F.2d 838, 841 (5th Cir.) (en banc) (per curiam) (defining municipal "custom" for § 1983 purposes), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc reh'g).

they do not openly advocate such behavior. Given that no formal policy will exist in such circumstances, liability will hinge on the existence of an unofficial, and more difficult to prove, custom.[5] Thus, proof that a municipal custom of malign neglect caused a constitutional violation will almost always depend on indirect, circumstantial evidence.[6] Many lower courts have therefore adopted a flexible approach to the problem of proof in such cases. These courts generally permit an inference that a municipal custom caused plaintiff's injury based on either

---

[5] While "custom" and "causation" are theoretically distinct elements of municipal liability, proof of these elements in "failure to train" cases often involves similar evidence, including police department screening, hiring, and training of new officers, and the supervision and discipline of field officers.

[6] This Court has often adverted to the value of evidence of effect as an indirect means of proving unlawful purpose. See, e.g., Rogers v. Lodge, 458 U.S. 613, 618 (1982); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1977); Washington v. Davis, 426 U.S. 229, 242 (1976).

(1) municipal inaction in the face of a pattern of prior, similar incidents,[7] or (2) a single injurious incident plus evidence warranting a jury finding that deliberate indifference to adequate hiring, training, or supervision of the police force caused the injury.[8] The present action falls into the

[7] E.g., Batista v. Rodriguez, 702 F.2d 393, 397 (2d Cir. 1983) (persistent failure to discipline police officers who violated civil rights); Powe v. City of Chicago, 664 F.2d 639, 643, 650-51 (7th Cir. 1981) (four erroneous arrests of same person based on same defective warrant); Herrera v. Valentine, 653 F.2d 1220, 1225 (8th Cir. 1981) (city authorities aware of continuing police misconduct); Littlefield v. Deland, 641 F.2d 729, 732 (10th Cir. 1981) (pattern of prolonged detentions of mentally disturbed prisoners in strip cell); Thurman v. City of Torrington, 53 U.S.L.W. 2246 (D. Conn. Oct. 23, 1984) (police consistently provided less protection for victims assaulted by husbands or boyfriends).

[8] E.g., Hays v. Jefferson County, 668 F.2d 869, 874 (6th Cir.) (municipality may be liable for reckless or grossly negligent police training), cert. denied, 459 U.S. 833 (1982); Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir.) (county may be liable for beating of prisoner if failure to train or supervise prison guards constituted gross negligence or deliberate indifference to prisoner's constitutional rights), cert. denied, 444 U.S. 980 (1979); Hardeman v. Clark, 593 F. Supp. 1285, 1287 (D.D.C. 1984) (District of Columbia may be liable for inadeqate procedures for police training and reprimand); Hill v. Marinelli, 555 [cont'd. on next pg]

latter category.

Contrary to the city's contention, City Brief 7-9, this action is not an attempt to impose a pure form of "single-incident" liability on Oklahoma City (the city) for an isolated incident of police brutality with no link to Oklahoma City police department policy or custom.[9] Nor is this an attempt to

F. Supp. 413, 416 (N.D. Ill. 1982) (grossly negligent police training); Popow v. City of Margate, 476 F. Supp. 1237, 1245-46 (D.N.J. 1979) (city may be liable where failure to train, supervise or discipline police officers is reckless or grossly negligent); Leite v. City of Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978) (pattern of past police misconduct not required; city may be liable if training or supervision is so deficient that misconduct and resulting harm are almost inevitable).

[9] While a single incident itself might be so brutal and egregious as to permit an inference that the failure of policymaking officials to take precautions against such action represented deliberate indifference to the consequences, e.g., Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir.), cert. denied, 449 U.S. 1016 (1980); Owens v. Haas, 601 F.2d 1242, 1246-47 (2d Cir.), cert. denied, 444 U.S. 980 (1979); Leite v. City of Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978), a single incident alone usually will not suffice to establish the requisite degree of culpability for supervisory inaction upon which to predicate municipal liability under § 1983. See, e.g., Bennett v. City of Slidell, 728 F.2d 762, 768 [cont'd. on next pg]

prove a custom through nothing more than the behavior of street-level police officers,[10] without any evidence concerning departmental programs. Rather, Tuttle introduced "extensive evidence" proving the grossly inadequate training afforded all police officers in Oklahoma City. Tuttle v. City of Oklahoma City, 728 F.2d 456, 459-61 (10th Cir. 1984); Jt. App. 67-71. Tuttle also showed that the city had a well-established

---

(5th Cir.) (en banc) (single instance of unequal enforcement of city building code establishes no city custom), petition for reh'g denied per curiam, 735 F.2d 863 (5th Cir. 1984) (en banc), petition for cert. filed, 53 U.S.L.W. 3419 (U.S. Sept. 14, 1984); Berry v. McLemore, 670 F.2d 30, 32-33 (5th Cir. 1982) (isolated decision not to discipline police officer did not prove city policy or custom). However, the Court need not address the propriety of single-incident liability in this case; the evidence here went far beyond the incident itself.

[10] See Webster v. City of Houston, 735 F.2d 838, 842 (5th Cir.) (en banc) (per curiam) (for city employees' actions alone to prove a city custom, those actions must have recurred often), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc reh'g) (affirming judgment of liability against city).

custom of permitting rookie officers to patrol, and to respond to suspected armed robberies, alone.[11]

The fatal shooting of William Tuttle plus the grossly inadequate training and supervision of the Oklahoma City police force provided ample evidence to support the jury's finding that a city custom caused the constitutional violation. The few courts that have rejected the sufficiency of such evidence, and have instead required proof of a pattern of similar incidents,[12] are simply

---

[11] Testimony of Oklahoma City Police Captain Richard Delaughter, Trial Transcript 198-200, 206.

[12] E.g., Languirand v. Hayden, 717 F.2d 220, 227-28 (5th Cir. 1983), cert. denied, 104 S. Ct. 2656 (1984); Lenard v. Argento, 699 F.2d 874, 886 (7th Cir.), cert. denied, 104 S. Ct. 69 (1983); see also Wellington v. Daniels, 717 F.2d 932, 935-56 (4th Cir. 1983) ("Generally, a failure to supervise gives rise to § 1983 liability ... only in those situations in which there is a history of widespread abuse.").

The Fifth Circuit en banc recently qualified its Languirand holding (on which the city's brief relies heavily, Brief at 11-13), by distinguishing between "occasional acts of untrained policemen not otherwise attributed to city policy or custom" (which are not actionable), and "police recruitment and training that [cont'd. on next pg]

wrong. A pattern of injuries is a sufficient, but not a necessary predicate for municipal liability.[13] The city's argument for a "pattern" requirement, see City Brief 17, 22, would arbitrarily restrict plaintiffs trying to prove the existence of an unwritten, informal custom to a single method of proof.

The city's argument finds no support in this Court's decisions. In Monell, this Court held that municipalities "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though

---

is itself unconstitutional and injurious," (which is actionable). Bennett v. City of Slidell, 728 F.2d at 768 n. 3. The Fifth Circuit en banc also recently set out a general formula for a municipal custom. While this formula does require "[a] persistent, widespread practice of city officials or employees," it does not require a pattern of injurious incidents. See Webster v. City of Houston, 735 F.2d at 841. A "persistent, widespread practice" of clearly deficient training would appear to satisfy the Fifth Circuit's formula for municipal liability.

[13] See cases cited supra note 7.

such a custom has not received formal approval through the body's official decisionmaking channels.... 'Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a "custom or usage" with the force of law.'" 436 U.S. at 690-91 (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)); see Nashville, Chattanooga & St. Louis Railway Co. v. Browning, 310 U.S. 362, 369 (1940) ("Settled state practice ... can establish what is state law.... Deeply embedded traditional ways of carrying out state policy ... are often tougher and truer law than the dead words of the written text.") (quoted in Monell, 436 U.S. at 691 n. 56).[14]

---

[14] Cf. Lombard v. Louisiana, 373 U.S. 267, 273 (1963) (city may act as authoritatively through its executive as through its legislative body).

In Adickes, a suit brought under § 1983 for an alleged equal protection violation, the court concluded that a private restaurant, acting in concert with local police officials, had a "custom" of not serving white persons in the company of black persons. In so holding, the Court reversed the Second Circuit, which had affirmed a directed verdict for the restaurant on the grounds that plaintiff had failed to show other instances of a refusal to serve white persons in mixed-race groups. 398 U.S. at 173.[15] Thus, this Court held that the Adickes plaintiff could prove a "custom" under § 1983 without having to show a pattern of past similar abuse.

[15] Of course, plaintiff could not have shown at her 1964 trial that the restaurant had a long-standing policy of serving only the blacks in an integrated group, because until shortly before that time blacks could not have obtained service at all. 398 U.S. at 173.

This Court's ruling in Rizzo v. Goode, 423 U.S. 362 (1976), provides no support for the city's argument that Tuttle does not have a valid cause of action against the city under § 1983. In Rizzo, this Court reversed a judgment that had provided injunctive relief against the top officials of the Philadelphia police department in the wake of a series of reported incidents of excessive use of force against city residents.

The Rizzo Court emphasized the absence from plaintiffs' proof of any affirmative link between their injuries and any plan or policy of the city's officials. 423 U.S. at 371. In Monell, this Court explained that the causal connection missing in Rizzo could be supplied by proof of a failure to train or to supervise police officers: "By our decision in Rizzo v. Goode, 423 U.S. 362 (1976), we would appear to have decided that the mere right to control without any control

or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability." Monell, 436 U.S. at 694 n. 58 (emphasis added). This passage implies that either an affirmative exercise of control or a failure to train or to supervise could justify municipal liability.

Beyond the Monell Court's use of Rizzo in the context of municipal liability, Rizzo has little precedential value for the present case. In reversing the Rizzo lower courts, this Court focused on plaintiffs' lack of standing, on a federal court's limited power to grant the equitable relief sought, and on related values of federalism. All of these concerns dissipate where, as here, plaintiff seeks monetary rather than injunctive relief.[16]

[16] In addition, Rizzo concerned official, not municipal, liability. 423 U.S. at 365 n. 1, 367. In the pre-Monell world in which this Court decided [cont'd. on next pg]

To be sure, a municipality's failure to act can only constitute deliberate indifference to constitutional violations if the municipality knew or had reason to know that such violations were likely to occur were preventive measures not taken. But it does not follow that a municipality can acquire such knowledge, actual or constructive, only from a pattern of similar incidents. The city in effect presses the astounding proposition that there is but one way to put a municipality on notice of likely impending violations. But a municipality may

Rizzo, municipalities were not liable under § 1983. Since Monell, this Court has established distinct and separate standards of liability for municipalities and municipal officials. Officials may assert the defense of qualified immunity; municipalities may not. Owen v. City of Independence, supra. Officials may be liable for punitive damages; municipalities may not. Newport v. Fact Concerts, Inc., supra. The evolution of divergent schemes of liability for officials and municipalities, based on legislative history and public policy, cautions against the broad application of Rizzo and other official liability decisions in the present context.

have notice even absent a pattern of actual prior incidents. Granted, official inaction in the face of a pattern of brutal slayings would be highly probative of tacit approval of a subordinate's unconstitutional behavior. But official inaction to improve a grossly deficient training program that had not yet resulted in any harm could, under proper circumstances, also indicate tacit approval of the constitutional violations that would likely result. Surely a court cannot determine as a matter of law in advance of any factual presentation that no program of training and supervision could be so deficient as to support an inference that policymaking officials were deliberately indifferent to the inevitable results of inadequately training or supervising the police force.

For instance, suppose a police department, in full compliance with its

screening and hiring policy, hires a white police officer with a known record of convictions for violent crimes and known racist beliefs. The department gives the new officer no training or guidance, arms him, and sends him on patrol alone in a black neighborhood. He shoots and kills an unarmed black youth who runs from the officer when asked for identification. Given such facts, could this Court say that no reasonable juror could find that a city custom caused -- was the "moving force" behind -- a denial of the victim's constitutional rights?

If the Court agrees that in this hypothetical "failure to train" case a jury could find for plaintiff against the municipality, then the existence of a municipal custom in the instant case, in which plaintiff Tuttle presented extensive evidence of the city's failure adequately to train or to supervise its police officers,

becomes a question of fact for the jury, properly charged, to decide.[17] The district court's instructions, read as a whole,[18] correctly informed the jury concerning municipal liability. The court explained that the city could not be liable on a respondeat superior basis; that the city could be liable only if a city policy proximately caused a constitutional violation; that a city policy or custom could cause a deprivation of rights if the jury found that the city implicitly or tacitly authorized, sanctioned, ratified, or acquiesced in the deprivation; and that the existence of a policy could be inferred from the acts or omissions of supervisory officials if those omissions amounted to deliberate indifference to constitutional rights or tacit approval of constitutional violations.[19]

The jury decided for Tuttle. Given that the district court's instructions accurately portrayed the controlling law and that the record contained ample evidence to support the verdict, the district court properly denied the city's motions for a directed verdict and for a judgment notwithstanding the verdict.[20] Appellate review of a

---

[17] See Iskander v. Village of Forest Park, 690 F.2d 126, 129 (7th Cir. 1982) (whether police had custom of strip-searching suspects in semi-public room was question of fact for jury); Herrera v. Valentine, 653 F.2d at 1224 n. 2 (appellate court may not substitute its judgment for that of the jury concerning ultimate finding of municipal liability). But see Turpin v. Mailet, 619 F.2d at 203 (reversing jury verdict against city in "failure to discipline" case).

[18] The city's misleading quotation, Brief at 8-9, of less than a single sentence of the district court's lengthy instructions, Jt. App. 25-54, flouts the fundamental rule of appellate review that jury instructions are to be evaluated as a whole. See 9 Wright & Miller, Federal Practice & Procedure § 2558, at 668 (1971 & Supp. 1984).

[19] The opinion below quoted the relevant portions of the district court's instructions. 728 F.2d at 460; Jt. App. 68-69. The full instructions are reprinted at Jt. App. 25-54.

[20] Cf. Doe v. New York City Department of Social Services, 709 F.2d 782, 791-92 (2d Cir.) (reversing [cont'd. on next pg]

district court's denial of a motion for judgment notwithstanding the verdict is severely limited. Reviewing courts must view the evidence in the light most favorable to the party that prevailed before the jury, giving the benefit of all favorable inferences to that party. See, e.g., Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696-97 & n. 6 (1962); Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 358-59 (1962); Lavender v. Kurn, 327 U.S. 645, 652-53 (1946); 5A Moore's Federal Practice ¶ 50.07[2], at 50-79 to 50-84 (1984).[21]

---

district court's grant of judgment n.o.v. to defendant, the city's child placement agency, because there was more than sufficient evidence of agency's deliberate indifference in failing to supervise plaintiff child's placement in foster home where she had been sexually abused), cert. denied, 104 S. Ct. 195 (1983).

[21] See Independence Tube Corp. v. Copperweld Corp., 691 F.2d 310, 319-20 & n. 14 (7th Cir. 1982), rev'd on other grounds, 81 L.Ed.2d 628 (1984); Hahn v. Atlantic
[cont'd. on next pg]

Following bench trials, this Court has repeatedly invoked Rule 52(a) of the Federal Rules of Civil Procedure in stating that the factual findings of district courts sitting without a jury may be reversed only if "clearly erroneous." See, e.g., Bose Corp. v. Consumers Union, 80 L.Ed.2d 502, 515 (1984) (citing cases); Pullman-Standard v. Swint, 456 U.S. 273, 287-90 (1982); United States v. United States Gypsum Co., 333 U.S. 364, 394-95 (1948).[22] Given the command of

---

Richfield Co., 625 F.2d 1095, 1099 (3d Cir. 1980), cert. denied, 450 U.S. 981 (1981); Samuels v. Health & Hospitals Corp., 591 F.2d 195, 198 (2d Cir. 1979); Peterman v. Chicago, Rock Island & Pacific Railroad Co., 516 F.2d 328, 330 (8th Cir.), cert. denied, 423 U.S. 869 (1975).

As the Third Circuit stated in an appeal from a jury verdict for plaintiffs in another § 1983 municipal liability case, the appellate court should uphold a jury verdict unless the record is "critically deficient of that minimum quantum of evidence from which the jury might reasonably afford relief." Black v. Stephens, 662 F.2d 181, 187 (3d Cir. 1981) (quoting cases), cert. denied, 455 U.S. 1008 (1982).

[22] The holding in the Bose case that constitutional considerations in public-figure libel cases require de novo appellate review in derogation of Rule 52(a)'s clear meaning is inapposite here. The city has made
[cont'd. on next pg]

the Seventh Amendment and the historic role of the jury, a jury's verdict is entitled to even greater appellate deference than is a trial court's findings of fact. See Loehr v. Offshore Logistics, Inc., 691 F.2d 758, 760 & n. 3 (5th Cir. 1982); Nunez v. Superior Oil Co., 572 F.2d 1119, 1124 n. 6 (5th Cir. 1978), aff'd following remand, 644 F.2d 534 (5th Cir. 1981).[23] Jury fact-finding, unlike judicial fact-finding, is not subject to direct attack as "clearly erroneous." Independence Tube Corp. v. Copperweld Corp., 691 F.2d at 319.

---

no claim that constitutional (or any other) factors mandate a departure from normal deference to the findings of the trier of fact.

[23] See also New York Central & Hudson River Railroad Co. v. Fraloff, 100 U.S. 24, 25 L.Ed. 531, 535 (1879) ("[This Court's] power is restricted by the Constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties.") (citing cases).

The absolute rule advocated by the city would contravene an essential element of the scheme of municipal liability under § 1983 that has evolved since Monell. A rule requiring a pattern of similar incidents to sustain municipal liability for failure to act would provide a municipality with a form of qualified immunity, which this Court expressly rejected in Owen v. City of Independence, 445 U.S. 622 (1980). The city's argument reduces to a claim that a municipality can be held liable for failing to take action only in those cases in which the need for action was clearly necessary to prevent continued repetition of demonstrated harms. The city's reading of § 1983 would insulate a municipality from liability even if its policymakers had reason to believe (based on a clearly deficient plan for training or supervision) that constitutional

violations and grave harm were inevitable absent ameliorative measures.[24] Despite Owen, the city would thus grant to municipal defendants in "failure to train" cases even greater immunity from § 1983 liability than this Court has granted to official defendants in § 1983 actions. This Court's test for the qualified immunity of government officials permits a civil damages remedy against government officials performing discretionary functions only insofar as their conduct violates "clearly established ... constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).[25] The

[24] For instance, the city's construction of § 1983 would deny liability even if the city had received an emergency warning from a national commission responsible for evaluating police training programs.

[25] While Harlow addressed the qualified immunity of federal officials sued directly under the Constitution, the Harlow formulation applies as well in suits against state and local officials under § 1983. See Harlow v. Fitzgerald, 457 U.S. at 818 n. 30.

city's interpretation of § 1983 would bar municipal liability under circumstances in which municipal officials could be found liable for failure to take action to prevent inevitable violations of clearly established constitutional rights.

B. Municipal Liability in This Case Will Not Lead to Strict Liability Against Municipalities.

Rejection of the arbitrary "single-incident" rule proposed by the city would not result in § 1983 municipal liability for all wrongs committed by a municipality's police officers and other employees.

The city's rigid view ignores that a continuum of culpability extends from strict liability at one extreme to purposeful wrongdoing at the other.[26] Section 1983 does

[26] Intermediate points, in order of increasing culpability, have in various contexts been termed negligence, gross negligence, recklessness, and knowledge.

not permit respondeat superior liability against municipalities. Monell, 436 U.S. at 691. But neither is municipal liability limited only to instances at the opposite extreme -- purposeful wrongdoing. This Court has rejected the view that a § 1983 defendant may be liable only for its actions that purposefully contravene federal rights. See Parratt v. Taylor, 451 U.S. 527, 534 (1981) ("Nothing in ... § 1983 ... limits the statute solely to intentional deprivations of constitutional rights" or denies liability for a "wrong ... negligently as opposed to intentionally committed"); Baker v. McCollan, 443 U.S. 137, 139-40 (1979).

Of course, in the context of municipal liability for a failure to act, a plaintiff must show a sufficient degree of actual or constructive awareness on the part of municipal policymakers so that a failure to act can be fairly characterized as the cause

of the constitutional violation and resulting harm. Thus, not every failure to train or to supervise that resulted in harm would justify liability. Drawing on this Court's cases, most lower courts have correctly noted that a municipality's failure to act can be fairly deemed a custom for § 1983 purposes only if that failure constitutes gross negligence, recklessness, or "deliberate indifference" to a plaintiff's constitutional rights.[27]

---

[27] See, e.g., Wellington v. Daniels, 717 F.2d at 936; Hays v. Jefferson County, 668 F.2d at 871-73; Avery v. County of Burke, 660 F.2d 111, 114 (4th Cir. 1981); Turpin v. Mailet, 619 F.2d at 202; Owens v. Haas, 601 F.2d at 1246; Leite v. City of Providence, 463 F. Supp. at 590-91. But see Gilmere v. City of Atlanta, 737 F.2d 894, 904 (11th Cir. 1984) (holding "gross negligence" or "deliberate indifference" improper as test for adjudging due process § 1983 claim against municipality). The Eleventh Circuit in Gilmere simply overlooked this Court's construction of § 1983 in Monell, where this Court stated that the framers of the statute intended to create a remedy where state actors were "deliberately indifferent to the rights of black citizens." 436 U.S. at 685 n. 45. The "deliberate indifference" standard finds further support in Estelle v. Gamble, 429 U.S. 97 (1976), a § 1983 suit alleging an Eighth Amendment violation for inadequate medical care in prison. This Court held that mere negligent failure to provide proper care did not state a valid § 1983 cause of action. Instead, [cont'd. on next pg]

Liability may attach only when the municipality's failure to train, supervise, or discipline its employees is so egregious as to indicate that municipal policymakers simply did not care about the inevitable consequences of not taking any corrective action. Thus, the municipality is not held liable for the actions of its employees on a respondeat superior basis. Rather, the municipality is held liable for its own actions that proximately cause a deprivation of constitutional rights. Since municipal liability for inaction arises only when there exists highly foreseeable harm resulting from that inaction, there is little threat that rejection of the city's theory would lead to a raid on municipal treasuries for every misdeed of a police officer. Given that

---

this Court required the plaintiff to show that the state officials acted with "deliberate indifference" to the probable constitutional violation. Id. at 104-06.

state and local officials may be liable under § 1983 for punitive damages for "reckless or callous disregard for the plaintiff's rights," Smith v. Wade, 75 L.Ed.2d 632, 648 (1983), it would be ironic indeed if this Court barred municipality liability for mere compensatory damages where, as here, a jury had found that the acts or omissions of municipal policymakers evidenced deliberate indifference to Tuttle's rights and caused his death.

II. A Rule Barring Municipal Liability For Inadequate Training and Supervision Resulting in a Single Incident of Official Misconduct Would Eviscerate The Compensatory and Deterrent Goals of 42 U.S.C. § 1983.

A. The Legislative History of § 1983 Evinces Congressional Intent to Impose Liability on Municipalities Not Only for Affirmative Harms, But Also for Failure to Act to Protect the Constitutional Rights of Citizens.

The framers of section one of the Civil Rights Act of 1971,[28] the forerunner of

§ 1983, specifically intended to create a remedy not only for affirmative denials of constitutional rights, but also for failures by government officials to take adequate measures to protect those rights. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [the Act]." Monroe v. Pape, 365 U.S. at 174-75. A passive denial of protection, while perhaps harder to discern than an illegal affirmative act, causes no less harm to the victim. In canvassing the legislative history of the Act, this Court stated in Monell that section one "extended a remedy not only where a State had passed an unconstitutional statute, but also where officers of the State were deliberately indifferent to the rights of

[28] Act of April 20, 1871, Ch. 22, 17 Stat. 13 (1871).

black citizens." 436 U.S. at 685 n. 45.[29]

Representative Hoar stated during the congressional debate over section one of the Act that

> denial ... of the protection of the laws [is not] to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights ... [but also] when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection.

Cong. Globe, 42d Cong., 1st Sess. 334 (1871) [hereinafter cited as "Cong. Globe"]. Representative Sheldon, urging that "it is the highest duty of the government to provide means to protect and secure every citizen in

[29] While the desire to protect black citizens through enforcement of the Civil War Amendments may have motivated congressional supporters of section one of the Civil Rights Act, Congress framed the statute in general terms, creating a federal cause of action for the deprivation, under color of state law, "of any rights ... secured by the Constitution and laws" of the United States. 42 U.S.C. § 1983; see Monroe v. Pape, 365 U.S. at 183 ("[A]lthough [§ 1983] was enacted because of the conditions that existed in the South at that time, it is cast in general language ...").

undisturbed enjoyment" of his constitutional rights, said:

> It must be apparent that these amendments enlarge the power of the Government in controlling the action of the States and I believe that it can extend its power, through its courts, in times of peace, directly to the individual who is deprived of his rights, ... whether through the positive act or the default of the State authorities.

Cong. Globe 367-68 (emphasis added).

Representative (later President) Garfield, in voicing his support for the bill, explained that the statute would reach maladministration of the laws as well as neglect or refusal to enforce them. Cong. Globe, 42d Cong., 1st Sess. App. 153 (1871) [hereinafter cited as "Con. Globe App."];[30]

[30] Rep. Garfield stated: "[B]y a systematic maladministration of [state laws], or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them. Whenever such a state of facts is made out, I believe the last clause of the first section [of the Fourteenth Amendment] empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection." Cong. Globe App. [cont'd. on next pg]

see also Cong. Globe 428 (Rep. Beatty) (states have denied persons equal protection, through "lack of power or inclination"); id. at 459 (Rep. Coburn) (unlawful state action not always affirmative); Cong. Globe App. 78, 80 (Rep. Perry) (local officials fail to take action against illegal activity); id. at 147 (Rep. Shanks) ("the civil authorities lie dumb before the violators of the law"); id. at 300 (Rep. Stevenson) (denial of equal protection is more often passive than active).[31]

B. The Compensatory and Deterrent Functions of § 1983 Require Municipal Liability Under the Circumstances of this Case.

Compensation of the victims of

153. Section one of the Act did not, of course, limit itself to enforcement of the equal protection clause of the Fourteenth Amendment. See supra note 29.

[31] See generally Developments, Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1141-56 (1977); Note, Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," 79 Colum. L. Rev. 304, 307-09 (1979).

unconstitutional action and deterrence of like misconduct in the future constitute the primary goals of § 1983. See Owen v. City of Independence, 445 U.S. at 651; Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Carey v. Piphus, 435 U.S. 247, 256-57 (1978). In enacting section one of the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, Congress adopted a specific policy intended to effect the goals of compensation and deterrence: Congress made those persons (including municipalities) who, under color of state law, violate a person's constitutional rights liable for injuries resulting from the violation. Any rule that would shield a municipality from § 1983 liability for its unconstitutional actions, regardless of the municipality's deliberate indifference to the potential harm, the municipality's causal responsibility, or the severity of the injury incurred, would

subvert the compensatory and deterrent purposes of § 1983.[32]

As the Court has emphasized in recent decisions, municipal liability plays a critical role in fulfilling the compensatory purpose of the statute. In Monell, 436 U.S. at 685 & n. 45, the Court noted that statements by supporters of § 1983 indicated Congress' intention to redress the unconstitutional misconduct of even municipalities by making those municipalities liable for compensatory damages. Later, in holding that a municipality does not enjoy

---

[32] See J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 456 (1978) (goals of compensation and deterrence more frequently met if defendant is the government, not an individual); cf. Robertson v. Wegmann, 436 U.S. at 599 (Blackmun, J., dissenting) (objecting to a state survivorship law that abated a § 1983 claim where there was obvious unconstitutional misconduct because "[a]ny crabbed rule of survivorship obviously interferes directly with the second critical interest [deterrence] and may well interfere with the first [compensation]").

qualified immunity under § 1983 based on the good-faith actions of its officers, the Court emphasized that compensatory damages "[are] a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, 445 U.S. at 651; see Carey v. Piphus, 435 at 254-56 (§ 1983 damages should compensate persons for injuries caused by deprivation of constitutional rights); cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (in action for damages directly under Fourth Amendment, plaintiff is entitled to compensation); Butz v. Economou, 438 U.S. 478, 506 (1978) (in Bivens action, damages can be important means of vindicating constitutional guarantees). In both Monell and Owen, the compensatory purpose of § 1983 served as a rationale for refusing to shield municipalities from § 1983 liability.

The importance of compensation for constitutional wrongs "is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen v. City of Independence, 445 U.S. at 651. Local police should protect citizens against violent, lawless behavior, not subject them to it. When a municipality's willful indifference to the training or supervision of its police officers is so substantial as to predictably cause a deprivation of liberty and life without due process, albeit in a single incident, the victim of the municipality's unconstitutional misconduct should receive compensation.[33] From the victim's perspective, there is only one opportunity for compensation. The city's reading of § 1983 would always leave uncompensated at

[33] In addition, a municipality is far less likely to be judgment-proof than is a city police officer.

least the first victim of a municipality's unconstitutional custom.

Deterrence serves, with compensation, as an essential purpose behind § 1983. Owen v. City of Independence, 445 U.S. at 651; Newport v. Fact Concerts, Inc., 453 U.S. 247, 268 (1981); Robertson v. Wegmann, 436 U.S. at 590-91; Carey v. Piphus, 435 U.S. at 256-57; Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment).[34] In explaining the deterrent rationale for holding that municipalities do not have qualified immunity under § 1983, the Court in Owen stated:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not,

[34] See also Carlson v. Green, 446 U.S. 14, 21 & n. 6 (1980) (Bivens remedy has deterrent as well as compensatory purpose, and § 1983 serves similar purposes). The legislative history of § 1983 contains numerous references to the intended deterrent effect of the statute. See Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213, 244-45 & n. 174 (1979) (quoting seven Congressmen).

> should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those 'systemic' injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.

Owen v. City of Independence, 445 U.S. at 651-52 (footnotes and citation omitted). Cf. United States v. Johnson, 457 U.S. 537, 561 (1982) (retroactive application of decision upholding Fourth Amendment claim gives government incentive to err on side of constitutional behavior). Where, as here, a city gives its police officers negligible training in responding to armed robbery situations and routinely permits rookie

policemen to patrol (and to respond to armed robberies) alone, city officials should not be surprised when the unthinkable becomes inevitable: an unarmed man[35] is shot in the back in a dark parking lot while walking away from a drinking club where no robbery had occurred. Such an injury reflects a "systemic" failure of the kind that, as the Owen Court realized, could be eliminated by providing proper incentives to relevant

[35] The record indicates that Mr. Tuttle was unarmed at the time that Officer Rotramel fired the fatal shot. Rotramel admitted that he never saw any weapon. Jt. App. 158. Officer Lennox, who arrived at the scene soon after the shooting, searched and found nothing in Tuttle's boot. Id. 259-60. From the time of the shooting until Tuttle's arrival at the hospital, the police had Tuttle under their continuous and exclusive control. The police denied Mrs. Tuttle, who had arrived at the scene, access to her dying husband. Trial Transcript 231-32. Only after Mr. Tuttle had arrived at the hospital did a toy pistol appear in his boot. The sequence of events is, to say the least, suspicious. Cf. Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982) (detailing police use of "throw-down" weapons), petition for reh'g en banc granted, 711 F.2d 35 (5th Cir. 1983), vacated and remanded per curiam, 735 F.2d 838 (5th Cir.), aff'd in part, rev'd in part, and remanded per curiam, 739 F.2d 993 (5th Cir. 1984) (on petition for en banc rehearing).

municipal decisionmakers. When the possibility of liability would provide municipalities with an incentive to reduce the likelihood of this type of injury, any categorical bar against municipal liability would erode the basic purposes of § 1983.

The deterrent role of a § 1983 damages remedy in cases such as this has no current substitute. Los Angeles v. Lyons, 75 L.Ed.2d 675 (1983), effectively precludes injunctive relief under § 1983 against unconstitutional police practices. Federal criminal prosecutions for violations of federal civil rights[36] are only sporadically used, cannot be privately enforced, and require a heavier burden of proof than that required in a civil actior Further, a municipality is free from the spectre of punitive damages for its constitutional violations. Newport v. Fact Concerts, Inc., supra.

[36] E.g., 18 U.S.C. §§ 241, 242, & 245.

Moreover, given that defendant officials will often enjoy either absolute[37] or qualified[38] immunity from § 1983 liability, to deny municipal liability for an entire class of cases will leave victims without compensation and will provide no incentive to potential defendants to minimize unconstitutional behavior. Cf. Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certain consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.").

[37] E.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges).

[38] E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (broadening "good-faith" immunity by allowing defendants to satisfy only an objective standard).

C. A Municipality Is In The Best Position To Evaluate The Costs and Benefits of Additional Police Training and Supervision.

The § 1983 damages remedy is based in part on the theory of deterrence, which presupposes rational decisionmakers taking only those actions where benefits exceed costs. A damages remedy performs a deterrent function by forcing a party to consider the costs of certain action or inaction that would otherwise have been borne by some other party. Thus, damages serve to "internalize" costs to the decisionmaker. See generally G. Calabresi, The Costs of Accidents 68-129 (1970).

Under this view of deterrence, liability should be placed on the party best able to determine the true costs and benefits of a given course of action and to effect a change in behavior based on that determination.[39]

[39] See Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055, 1060 (1972).

Common sense suggests that municipal police departments are more adept than individual police officers at identifying and evaluating "different strategies for deterring illegal [conduct] and can also better predict the likely effects of alternative deployments of police officers, training methods, or [behavioral] guidelines upon both deterrence and vigorous decisionmaking." P. Schuck, Suing Government 104 (1983) (footnote omitted). Judge Newman has noted more generally that municipal liability "enhance[s] the prospects for deterrence by placing responsibility for the denial of constitutional rights on the entity with the capacity to take vigorous action to avoid recurrence." J.O. Newman, supra note 32, at 457. The threat of liability "gives the [municipality] an incentive to minimize the 'good faith' unconstitutional errors of its police through more careful selection,

training, and supervision." Posner, Rethinking the Fourth Amendment, 1981 S. Ct. Rev. 49, 68; see also Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 641 (1982).

Had Oklahoma City assumed that it could be liable for the unconstitutional behavior of its police officers, it could have determined the likely cost and efficacy of: giving police trainees additional instruction in how to respond to suspected armed robbery situations and how to apprehend a fleeing suspect; prohibiting rookie officers from patrolling alone; and ordering rookies or all officers to request backup units in the type of situation that Officer Rotramel confronted.

A damages remedy, unlike an injunctive remedy, permits the municipality, rather than a judge, to choose the optimal mix between

street-level discretion, which may increase the cost of adverse verdicts,[40] and additional preventive measures.[41] A damages remedy thus provides general deterrence against constitutional violations while respecting the values of federalism that favor the decisionmaking independence of local officials. Cf. Rizzo v. Goode, 423 U.S. 362 (1976).

[40] Win or lose, a municipality often incurs litigation expenses to defend itself or its officers following an incident of police brutality. These expenses must be added to the cost of adverse verdicts to determine the actual cost of not taking preventive measures.

[41] "A rigorous empirical study of the effect of a New York City police department rule restricting officers' use of weapons found a decline in the use of deadly force without any effect on the incidence of crime, injuries to officers, or arrest activity." P. Schuck, supra page 46, at 144 (citing J. Fyfe, Shots Fired: An Examination of New York City Police Firearms Discharges (Univ. Microfilms Int'l 1978)).

CONCLUSION

Monell's holding that a municipality may be liable under § 1983 only if a municipal policy or custom caused a constitutional violation does not justify an arbitrary rule that gives municipalities at least one "free" constitutional violation by barring municipal liability except in cases in which an injured victim could prove a pattern of similar past abuses. Neither the legislative history and purpose of § 1983, this Court's decisions construing that statute, nor considerations of public policy support the city's crabbed reading of the statute.

For the foregoing reasons, the judgment of the United States Court of Appeals for the

Tenth Circuit should be affirmed.

Respectfully submitted,

BURT NEUBORNE
CHARLES S. SIMS
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800*

DON ED PAYNE
American Civil Liberties
Union of Oklahoma
Foundation
P. O. Box 785
Hugo, Oklahoma 74743

December 15, 1984

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate whose application for admission to the New York State Bar is pending.